Supreme Court, U.S.
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No. 02-02

IN THE

Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Subsequent to the decision by the Second Circuit Court of Appeals in this case, the Supreme Court of Connecticut issued its decision in *Blumenthal v. Barnes*, 261 Conn. 434 (2002), 2002 WL 1822920 (Conn.) (hereafter referred to as "*Blumenthal*"). The issue in that case was the Petitioner Connecticut Attorney General's authority under the common-law of the State to initiate and maintain suits on behalf of the State. *Id.* at *1. Connecticut's Supreme Court ruled that: (a) the Attorney-General's authority to maintain actions in the name of the State was defined and bounded by specific statutes; and (b) there had not been a transfer of common-law authority to his office by implication or otherwise. ("We, therefore, agree with the trial court that the office of the attorney general is 'a creature of statute' that is governed by statute and, thus, has no common-law authority.") *Id.* at *11. There is no Connecticut statute that authorizes the Attorney General to assert the State's *parens patriae* authority, if any, with respect to either federal causes of action in general, or the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (as amended) ("ERISA"), causes of action in particular. Following the *Blumenthal* decision, the question presented is whether this Court should deny the Petition as having been filed on behalf of the State of Connecticut without its consent or authority?

2. The Court of Appeals for the Second Circuit held that the Petitioner lacked the standing to maintain an action pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), as neither the states nor state officials are granted such standing by Congress. *State of Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2d Cir. 2002) (hereafter referred to as "*PHS*"). Congress narrowly

limited the category of persons to whom it provided such standing to: (i) ERISA plan participants and their beneficiaries; and (ii) ERISA plan fiduciaries. 29 U.S.C. § 1132(a)(3). In light of the consistent precedent that only those persons specified in § 502(a)(3) have such standing, the question presented is whether there is any controversy or unresolved question of law respecting the Second Circuit's decision that this Court needs to resolve?

3. The Second Circuit Court of Appeals also ruled that the *parens patriae* authority of the states does not empower them to assert claims under § 502(a)(3) of ERISA. It held that, even if such *parens patriae* authority existed as claimed by Connecticut, Congress had the authority under the Commerce Clause to deny to the states the power to maintain an action under ERISA. *PHS*, 287 F.3d at 120, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987). Where, as is the case with respect to ERISA §§ 514(a) and 502(a)(3), 29 U.S.C. §§ 1144(a) and 1132(a)(3), Congress has determined to fully preempt the regulation of employee benefit plans, including specifically the remedies available with respect to such plans, the Tenth Amendment to the United States Constitution permits Congress to restrict the states' exercise of their *parens patriae* authority. *Id.* at 122. In light of the consistent rulings by this Court and the Circuit courts that ERISA fully preempts the field of ERISA benefit plan regulation to the complete exclusion of any state authority, the question presented is whether this Court has any need to revisit this settled principle of law, a principle that no state other than Petitioner has seen fit to challenge?

4. The Court of Appeals further held that the assignments provided to the Attorney General by participants of ERISA plans whose benefits were covered by Respondent,

Physicians Health Services of Connecticut, Inc. (hereafter referred to as "PHS"), did not provide the State with the requisite standing to bring an action under ERISA § 502(a)(3). *Id.* at 115. The Second Circuit held that applicable precedent required this conclusion as: (a) the State had not asserted any injury to itself; and (b) in the context of assignments that left the entitlement to receive benefits with the assignors, none of the remedies would flow to the State itself. *Id.* at 118. There is established and non-controversial precedent respecting the required elements of assignments that can confer standing on an assignee to assert a federal cause of action. The question presented, therefore, is whether there is any sound reason for this Court to expend its valuable time on this case?

STATEMENT PURSUANT TO RULE 29.6

Physicians Health Services of Connecticut, Inc. is a wholly owned subsidiary of Physicians Health Services, Inc. ("PHS").

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COUNTER STATEMENT OF THE CASE

The Attorney General of Connecticut brought an unprecedented complaint asserting causes of action under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), and seeking injunctive relief against PHS (hereafter the "Complaint"). The Complaint alleged that PHS, a health maintenance organization licensed and regulated by Connecticut's Insurance Department,[1] utilized a drug formulary that purportedly obstructed ERISA plan participants' access to prescription drugs chosen by their physicians. Neither the Insurance Commissioner nor any other State agency with regulatory power over managed care organizations joined the Attorney General in his lawsuit, or authorized its filing on their behalf.

Like virtually every health plan in the nation that offers a prescription benefit, including Connecticut's own Medicaid program[2], PHS attempts to conserve limited health care dollars and ERISA plan assets through use of a drug formulary. This formulary lists thousands of prescription medications, all of which are approved by the Food and Drug Administration. Employers which voluntarily establish ERISA health benefit plans frequently contract with managed care entities such as PHS to administer, among other benefits, their plan's prescription drug coverage. PHS' formulary is updated regularly, and its members are allowed under

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1. Conn. Gen. Stat. §§ 38a-478n; 38a-225; 38a-478c; 38a-478g; 38a-478m; and 38a-478u.

2. Under its own Medicaid program, Connecticut limits coverage for over-the-counter drugs and products for Medicaid recipients to those specified in the "Connecticut Formulary." Conn. Agencies Regs. § 17-134d-81(b)(4).

Connecticut law to request generic drugs to lower their prescription costs.[3] As is the case with Connecticut's Medicaid program,[4] PHS has a "prior authorization" process which allows its members to obtain coverage for prescription drugs that are not included in the formulary applicable to their ERISA plan. The members' physicians simply submit a request for coverage of the off-formulary drug to PHS.

The Complaint challenges, solely on ERISA grounds, the PHS drug formulary applied to the ERISA plans that PHS serves. Broad injunctive relief is sought which seeks judicial revision of the ERISA plan prescription benefits administered by PHS.

Section 502(a)(3) permits only a "participant, beneficiary, or fiduciary" of a health care plan established pursuant to ERISA to bring an action "to enjoin any act or practice which violates any provision . . . of the plan, or . . . to obtain appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The relief requested by the Attorney General would involve the federal courts in the administration of ERISA welfare benefit plans. The Complaint demands, for example, that PHS be ordered to submit to a federal court for its review and approval, a plan "for substituting the defendant's preferred medications for those originally prescribed while insuring [sic] that (i) the substitution is approved by the attending physician and (ii) the enrollee experiences no unreasonable delay before receiving an appropriate medication. . . ." Compl. at 4, ¶ 5.

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3. Conn. Gen. Stat. § 20-619(b).

4. Federal law specifies requirements for formularies that states may establish under Medicaid, including requirements for a prior approval process for non-formulary drugs. *See* 42 U.S.C. §§ 1396r-8 *et seq.*

REASONS FOR DENYING THE WRIT

There are sound and dispositive reasons demonstrating that this case does not merit review by the Court. All of those reasons relate to the incapacity of the Attorney General to bring the ERISA claims he purports to assert on behalf of the State of Connecticut.

A. The Court Lacks Jurisdiction Over This Matter Because the Attorney General Has No Authority to File the Petition for a *Writ of Certiorari.*

The decision of the Connecticut Supreme Court in the *Blumenthal* case holds that the Attorney General lacks authority under Connecticut law to bring this action on his own initiative. *Blumenthal*, 2002 WL 1822920, at *11. This dispositive point of law could not have been raised below, as the decision in *Blumenthal* was issued long after the decision of the Second Circuit Court of Appeals in this case. Even if it were assumed that the Attorney General, prior to *Blumenthal*, had the colorable authority to file this action, and to then appeal its dismissal, his Petition now pending before this Court clearly is an *ultra vires* act that cannot be accorded any recognition by the Court.

The *Blumenthal* decision ruled that the powers of the Attorney General of the State of Connecticut are created by, and derive exclusively from, statutes enacted by the State's legislature. *Blumenthal*, 2002 WL 1822920, at *11. The Connecticut Supreme Court expressly held that no general common-law authority to act on behalf of the State in its sovereign capacity devolved to, or resides in, the Office of the Connecticut Attorney General. *Id.* Consequently, when the Attorney General desires to exercise the State's *parens patriae* authority in a given instance, his ability to do so

depends upon the existence of a Connecticut statute conferring such authority upon him. *Id.* For example, the Attorney General may exercise the State's *parens patriae* authority to enforce its antitrust statutes only because a statute enacted by the State's legislature grants him that specific authority. *See* Conn. Gen. Stat. §§ 35-32. There is no Connecticut statute, however, which grants to the Attorney General the authority to perform any of the following acts:

> 1. File a lawsuit grounded on the remedial provisions of a federal statute, ERISA, which provisions preempt any and all state interference with the design and administration of benefits provided under ERISA plans;
>
> 2. Decide unilaterally for the State what its policies respecting prescription plan formularies should be, or how those policies should be enforced; and
>
> 3. Mandate health benefits that must be covered by managed care organizations in the State of Connecticut.

All of these acts are inextricable substantive elements of the relief sought by the Complaint.

Consequently, the Connecticut Supreme Court's ruling in *Blumenthal* compels the conclusion that the Attorney General's Petition before the Court is a nullity. The Petition has no more effect or validity than would have been the case if it were filed by a private citizen residing in Connecticut purporting to assert the State's *parens patriae* authority. On this ground alone, the Petition must be dismissed as unauthorized.

Of equal consequence, the Attorney General's lack of standing to act for the State deprives the Court of the jurisdiction to act on the Petition. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing imports justiciability, and a finding of standing, or the lack thereof, determines whether the "case or controversy" jurisdictional requirement imposed upon Article III courts is satisfied. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). As the Attorney General has no power to bring this suit under the laws of his State, which laws are the sole source of his authority, he cannot have any stake in the controversy he seeks to present for adjudication. *Lujan*, 504 U.S. at 560. That lack deprives him of standing, and also deprives this Court of jurisdiction over the Petition.

B. The Ruling that the State Lacks Standing to Assert Section 502(a)(3) Claims Is Mandated by the ERISA Statute and Established Precedent.

Congress clearly specified in ERISA Section 502(a)(3) the identity of the persons to whom it wished to provide the standing to seek the relief available through that remedial provision. Those persons are ERISA plan participants, their beneficiaries, and plan fiduciaries. *Id.* No governmental official, not even the Secretary of Labor, who has the primary regulatory responsibility for ERISA health and welfare plans,[5] has the standing to assert a Section 502(a)(3) claim. Confirmation that Congress expressly did not intend the states to have standing to assert Section 502(a)(3) claims is provided

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5. *See, e.g.*, ERISA Sections 501, 504 and 506, 29 U.S.C. §§ 1131, 1134 and 1136. *Cf. Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir. 1997) ("We begin by acknowledging the deference we owe the Secretary's interpretation of the controlling Act. The Secretary of the Department of Labor is charged with enforcing ERISA . . . ."

by Section 502(a)(7), 29 U.S.C. § 1132(a)(7) of ERISA. This is the only provision of ERISA that grants standing to the states to maintain an action for relief under the Act. In Section 502(a)(7), Congress allowed the states to "enforce compliance with a qualified medical child support order" as defined in 29 U.S.C. § 1169(2)(A). That is the sole enforcement authority granted to the states by Congress in ERISA.

This Court has consistently held that "ERISA carefully enumerates the parties entitled to seek relief under Section 502." *Franchise Tax Bd. v. Constr. Laborers Vac. Trust*, 463 U.S. 1, 27 (1983); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1984). The principle that the standing to bring an ERISA cause of action is limited solely to the parties specified by Congress in Section 502(a) has been scrupulously enforced by the Circuit Courts,[6] and the

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6. *Coleman v. Champion Int'l Corp./Champion Forest Prods.*, 992 F.2d 530, 534 (5th Cir. 1993) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loath to ignore the legislature's specificity"); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 302 (5th Cir. 1992) ("employers are conspicuously absent from the list of those entitled to bring a civil action"); *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 164 (9th Cir. 1992) ("No one except plan participants, beneficiaries, fiduciaries, and the Secretary of Labor is expressly authorized by § 1132(a) to bring claims in federal court," rejecting suit of insurance company); *Chemung Canal Trust Co. v. Sovran Bank*, 939 F.2d 12, 14 (2d Cir. 1991); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 987 (4th Cir. 1990) (standing under ERISA should be limited only to those parties enumerated in Section 502(a); *Gulf Life Insurance Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) ("These standing provisions must be construed narrowly; civil actions under ERISA are limited only to those parties and actions Congress specifically enumerated in Section 1132."); *Great Lakes Steel Div. of Nat'l Steel Corp. v. Deggendorf*, 716 F.2d 1101, 1103 (6th Cir. 1983) (employer has no standing as employer but does as plan fiduciary).

ruling of the Court of Appeals to that effect is neither novel nor a deviation from controlling precedent.

A party with standing is a prerequisite to an Article III court's adjudication of a claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Warth v. Seldin*, 422 U.S. at 498 ("In its constitutional dimension, standing imports justiciability: Whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.") The Petition offers no cogent reason why the Court should contemplate reversing its own consistent precedent in order to substitute its own judgment for that of Congress with respect to the persons who should have standing to assert claims under ERISA Section 502(a)(3). If the Attorney General believes that there are valid reasons why he and the other states' Attorneys General should have standing to assert claims under Section 502(a)(3) in order to effectuate policy reforms of prescription benefits provided to ERISA plan participants by managed care organizations, his arguments are properly addressed to Congress, not to the judiciary. *Cf. Pegram v. Herdrich*, 530 U.S. 211 (2000). Notably, even if Congress were to agree to amend ERISA Section 502(a)(3) to grant standing to state Attorneys General, Connecticut's Attorney General also would have to convince his State's legislature to grant him the authority to initiate such lawsuits.

C. Congress Has Denied the States the Ability to Exercise their Sovereignty, Including *Parens Patriae* Authority, Over Either the Benefits Offered By or the Administration of ERISA Plans.

This Court has affirmed in numerous decisions that ERISA's preemption provisions, Sections 502(a) and 514(a),

29 U.S.C. §§ 1132(a) and 1144(a), reflect the intent of Congress that the regulation of ERISA plans is "exclusively a federal concern." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2154 (2002) ("*Rush*") (Holding that an Illinois independent review statute affecting insured ERISA plan benefits was saved from preemption only because of the applicability of ERISA's "insurance savings" clause, 29 U.S.C. § 1144(b)(2)(A). Unlike the facts in *Rush*, the Attorney General does not contend that his views on the operation of ERISA plan prescription benefit formularies constitute the regulation of insurance by the State of Connecticut); *California Div. of Labor Standards Enforcement Bd. v. Dillingham*, 519 U.S. 316, 324 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 127 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *FMC Corp v. Holliday*, 498 U.S. 52, 58 (1990); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988); *Metropolitan Life v. Taylor*, 481 U.S. 58, 60-61 (1987); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 99 (1983); and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

The Attorney General does not stand in any better position with respect to ERISA's preemptive scope than the State he purports to represent in this matter. Indeed, ERISA's preemption clause expressly defines the term "State" as including:

> *any political* subdivisions thereof, or any agency or *instrumentality* of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. § 1144(c)(2) (emphasis added). The Attorney General cannot evade the direct applicability of ERISA's preemptive power to him in his capacity as an instrumentality of the State. He could abandon his official capacity, of course, and seek to maintain this action as a private citizen. If he were to do so, however, he also would abandon whatever capacity, if any, he asserts he has to invoke the State's *parens patriae* authority as a basis for the achievement of standing to assert a Section 502(a)(3) claim.

The assertion that ERISA's preemption provisions do not apply to the Attorney General's effort to impose upon ERISA plans a state official's views as to what constitutes proper plan benefit design and administration is transparently meritless. In the nearly three years that have elapsed since the Attorney General filed the Complaint, no other official of any state has filed an action seeking to be a plaintiff under ERISA Section 502(a)(3). No such officials have asserted that ERISA's preemption provisions do not preclude their interference with ERISA plan design and administration in the guise of seeking relief under ERISA Section 502(a)(3). The standing issues raised by the Attorney General clearly lack any public importance warranting the Court's concern and attention.

D. The Assignments Obtained By the Attorney General Are Ineffective to Confer Standing Upon Him To Assert an ERISA Section 502(a)(3) Claim.

The Court of Appeals found that the assignments obtained by the Attorney General from ERISA plan participants did not provide the State with a sufficient stake in the controversy attempted to be raised by the Complaint to confer standing upon the State to bring this suit. *PHS*, 287 F.3d at 116,

(*citing Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). The Second Circuit could have disposed of the issues related to the assignments on the ground that the assignors were barred by their plan documents from assigning any "rights, benefits . . . to any other person or entity, or otherwise transfer[ing] any claim . . . arising under this subscriber agreement." Joint Appendix of Petitioner (Appellant below), and Respondent (Appellee below) at 76. The assignments thus were void from the outset. *Cf. City of Hope Nat'l Med. Center v. Healthplus, Inc.*, 156 F.3d 223, 229 (1st Cir. 1998); *St. Francis Regional Medical Center v. Blue Cross and Blue Shield of Kansas, Inc.*, 49 F.3d 1460, 1464 (10th Cir. 1995); *Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1478 (9th Cir. 1991); *Arkansas Blue Cross and Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1346 (8th Cir. 1991) (ERISA preempts state statutes purporting to negate an ERISA plan's non-assignment clause.)

The assignments are invalid for the further reason that they are "partial" assignments and impermissibly "split-claims." The Attorney General confirmed at oral argument before the Second Circuit that the intent and effect of the assignments was that the assignors would "retain the right to seek payment of their benefits" from PHS, while the State would have the right to seek injunctive relief against PHS. *PHS*, 287 F.3d at 116, and n.6. Such "partial assignments" are improper because they injure "the right of the obligor [PHS] to be free of successive and repeated suits growing out of the same basic facts." *In re Fine Paper Litigation State of Washington*, 632 F.2d 1081, 1090 (3d Cir. 1980). The Restatement (Second) of Judgments, § 24, at Comment F, expressly prohibits such "claim-splitting": "[I]t is fair to hold that after judgment for or against the plaintiff the claim is

ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts."

In sum, the State improperly attempted to acquire just a portion of an ERISA claim in an effort to achieve the standing it knew it lacked to assert a Section 502(a)(3) claim. The Court of Appeals ruled that the Attorney General's efforts to achieve Section 502(a)(3) standing by means of this purely formalistic device were futile. It ruled that the Attorney General had not alleged, and could not show, that the assignments made the State an "injured party." *PHS*, 287 F.3d at 115. "Injury" to a plaintiff, the Court of Appeals pointed out, is an 'irreducible minimum" requirement of Article III standing. *PHS*, 287 F.3d at 116, *citing Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The "injury" requirement, in certain circumstances, may be satisfied if a "claim" belonging to an assignor is assigned to an assignee. *PHS*, 287 F.3d at 117, *citing Vermont Agency*, 529 U.S. at 773. A "claim," however, is more than a naked right to bring suit. *Id.* at 118, n.8. It must involve an outcome that will affect the assignee in a "personal and individual way. . . ." *Id.* at 118, *quoting Lujan*, 504 U.S. at 560 & n.1; and *Vt. Agency*, 529 U.S. at 772 ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing.") The assignments obtained by the State provided it "only the right to control" the lawsuit as none of the remedies sought would flow to the State as assignee. *PHS*, 287 F.3d at 118. The State thus: (a) had not suffered an injury itself, as it did

not, and could not, allege that it had been deprived of any benefits it was entitled to receive from PHS; and (b) the State would not be the recipient of any of the benefits produced by the relief demanded in its Complaint.

The assignments, therefore, were inadequate to provide the State with standing. Their only effect was to empower the State to orchestrate a litigation. They did not transfer either an "injury" to the State, or a right to the benefits of a favorable outcome. This simply is insufficient for the achievement of Article III standing. This Court ruled in *Valley Forge Christian College* that the "sincerity of [a state's] stated objectives and the depth of [its] commitment to them," have no bearing on standing. *Valley Forge Christian Coll.*, 454 U.S. at 486, n.21. "The essence of standing," the Court held, "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured" by the conduct constituting the ground of the claim at issue. *Id.*[7]

There is no good reason why the Court should trouble itself with a case which rests upon patently defective assignments conjured by the Petitioner to make it appear as if it had the standing to assert ERISA Section 502(a)(3) claims. The District Court and the Second Circuit Court of Appeals were not misled by the Attorney General's illusory assignments, and dealt with them as required by the applicable precedent established by this Court. There are no conflicts identified in the Petition between any of the Circuit

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7. The result reached by the Second Circuit also is consistent with ERISA precedent which rejects assignment of ERISA benefit claims other than to health care providers who are seeking payment for covered medical care services to eligible ERISA plan participants. *Simon v. Behavioral Health, Inc.*, 955 F. Supp. 93, 95 (C.D. Cal. 1997).

Courts of Appeal with respect to the requirements of Article III standing generally, or ERISA Section 502(a)(3) standing in particular. The Court's investment of its limited time on this case cannot be, and has not been, justified by the Petitioner.

CONCLUSION

For these reasons, it respectfully is submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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